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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/590,255	08/22/2006	Giovanni Mogni	41078	6071
86378	7590	06/08/2009		
Pearne & Gordon LLP			EXAMINER	
1801 East 9th Street			MARX, IRENE	
Suite 1200				
Cleveland, OH 44114-3108			ART UNIT	PAPER NUMBER
			1651	
NOTIFICATION DATE	DELIVERY MODE			
06/08/2009	ELECTRONIC			

Please find below and/or attached an Office communication concerning this application or proceeding.

The time period for reply, if any, is set in the attached communication.

Notice of the Office communication was sent electronically on above-indicated "Notification Date" to the following e-mail address(es):

patdocket@pearne.com  
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<b>Office Action Summary</b>	<b>Application No.</b> 10/590,255	<b>Applicant(s)</b> MOGNA ET AL.
	<b>Examiner</b> Irene Marx	<b>Art Unit</b> 1651

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --  
**Period for Reply**

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
  - If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
  - Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED. (35 U.S.C. § 133).
- Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

#### Status

- 1) Responsive to communication(s) filed on 24 April 2009.
- 2a) This action is FINAL.      2b) This action is non-final.
- 3) Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

#### Disposition of Claims

- 4) Claim(s) 1-23 is/are pending in the application.
- 4a) Of the above claim(s) 6 and 17-23 is/are withdrawn from consideration.
- 5) Claim(s) \_\_\_\_\_ is/are allowed.
- 6) Claim(s) 1-5 and 7-10 is/are rejected.
- 7) Claim(s) \_\_\_\_\_ is/are objected to.
- 8) Claim(s) \_\_\_\_\_ are subject to restriction and/or election requirement.

#### Application Papers

- 9) The specification is objected to by the Examiner.
- 10) The drawing(s) filed on \_\_\_\_\_ is/are: a) accepted or b) objected to by the Examiner.  
 Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).  
 Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

#### Priority under 35 U.S.C. § 119

- 12) Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) All    b) Some \* c) None of:
1. Certified copies of the priority documents have been received.
  2. Certified copies of the priority documents have been received in Application No. \_\_\_\_\_.
  3. Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

\* See the attached detailed Office action for a list of the certified copies not received.

#### Attachment(s)

- 1) Notice of References Cited (PTO-892)
- 2) Notice of Draftsperson's Patent Drawing Review (PTO-948)
- 3) Information Disclosure Statement(s) (PTO-1668)  
 Paper No(s)/Mail Date 8/22/06; 9/29/06
- 4) Interview Summary (PTO-413)  
 Paper No(s)/Mail Date. \_\_\_\_\_
- 5) Notice of Informal Patent Application
- 6) Other: \_\_\_\_\_

### **DETAILED ACTION**

The application should be reviewed for errors. Error occurs, for example, in the recitation of "stocks" rather than "strains" in the claims, which is the recognized terminology.

To facilitate processing of papers at the U.S. Patent and Trademark Office, it is recommended that the Application Serial Number be inserted on every page of claims and/or of amendments filed.

Applicant's election without traverse electing to prosecute the invention of Group I, claims 1-5 and 7-10 on 4/24/09 is acknowledged.

Claims 1-5 and 7-10 are being considered on the merits. Claims 6 is withdrawn from consideration as directed to a non-elected invention.

#### ***Claim Rejections - 35 USC § 112***

The following is a quotation of the second paragraph of 35 U.S.C. 112:

The specification shall conclude with one or more claims particularly pointing out and distinctly claiming the subject matter which the applicant regards as his invention.

Claims 1-5 and 7-10 rejected under 35 U.S.C. 112, second paragraph, as being indefinite for failing to particularly point out and distinctly claim the subject matter which applicant regards as the invention.

The claim 1 encompasses an improper Markush grouping because it does not use the form "selected from the group consisting of A, B, AND C). The term "comprising" renders the claim indefinite as to what is intended. See MPEP 2173.05(h)(a).

Claims 1-3 are confusing in that the intended meaning of "forced hetero-fermentative" is uncertain in this context. This phrase does not appear to encompass art recognized terminology.

Claims 1-5 and 7-10 are vague and indefinite in that the phrase "if necessary" renders the claim unclear as to whether the material is or is not intended to be part of the claim. There is no clear indication as to the circumstances that determine "necessity".

Claims 8-9 are vague, indefinite and confusing in the recitation of "quintal". This term can mean

- a) 112 pounds (50.85 kg) or
- b) 100 pounds (45.36 kg) or

c) about 220 pounds (100 kilograms [Arabic *qintār*] )

(<http://www.thefreedictionary.com/>)

Therefore, the "dose" intended cannot be determined since it is unclear which of the different meanings of "quintal" is intended. In addition, it is unclear whether the bacteria are intended to be alive or dead. Moreover, it is unclear whether dry or wet weight is intended.

Claim 9 is confusing and fails to find proper antecedent basis in claim 8. Claim 8 pertains to "average dose", while claim 9 pertains to "dose".

Claim 10 is confusing in that "are used in liquid culture" does not indicate the timing in the method that is intended. For example, is a liquid culture added to the fodders?

#### ***Claim Rejections - 35 USC § 112***

The following is a quotation of the first paragraph of 35 U.S.C. 112:

The specification shall contain a written description of the invention, and of the manner and process of making and using it, in such full, clear, concise, and exact terms as to enable any person skilled in the art to which it pertains, or with which it is most nearly connected, to make and use the same and shall set forth the best mode contemplated by the inventor of carrying out his invention.

Claims 1-5 and 7-10 are rejected under 35 U.S.C. 112, first paragraph, as containing subject matter which was not described in the specification in such a way as to enable one skilled in the art to which it pertains, or with which it is most nearly connected, to make and/or use the invention.

The invention appears to employ a specific strains of *Lactobacillus*. It is not clear if the written description is sufficiently repeatable to avoid the need for a deposit. Further it is unclear if the starting materials were readily available to the public at the time of invention.

It appears that a deposit was made in this application as filed as noted on page 8, last paragraph of the specification. However, it is not clear if the deposit meets all of the criteria set forth in 37 CFR 1.801-1.809. Applicant or applicant's representative may provide assurance of compliance with the requirements of 35 U.S.C § 112, first paragraph, in the following manner.

SUGGESTION FOR DEPOSIT OF BIOLOGICAL MATERIAL

A declaration by applicant, assignee, or applicant's agent identifying a deposit of biological material and averring the following may be sufficient to overcome an objection and rejection based on a lack of availability of biological material.

1. Identifies declarant.
2. States that a deposit of the material has been made in a depository affording permanence of the deposit and ready accessibility thereto by the public if a patent is granted. The depository is to be identified by name and address.
3. States that the deposited material has been accorded a specific (recited) accession number.
4. States that all restriction on the availability to the public of the material so deposited will be irrevocably removed upon the granting of a patent.
5. States that the material has been deposited under conditions that access to the material will be available during the pendency of the patent application to one determined by the Commissioner to be entitled thereto under 37 CFR 1.14 and 35 U.S.C § 122.
6. States that the deposited material will be maintained with all the care necessary to keep it viable and uncontaminated for a period of at least five years after the most recent request for the furnishing of a sample of the deposited microorganism, and in any case, for a period of at least thirty (30) years after the date of deposit for the enforceable life of the patent, whichever period is longer.
7. That he/she declares further that all statements made therein of his/her own knowledge are true and that all statements made on information and belief are believed to be true, and further that these statements were made with knowledge that willful false statements and the like so made are punishable by fine or imprisonment, or both, under section 1001 of Title 18 of the United States Code and that such willful false statements may jeopardize the validity of the instant patent application or any patent issuing thereon.

Alternatively, it may be averred that deposited material has been accepted for deposit under the Budapest Treaty on the International Recognition of the Deposit of Microorganisms for the purpose of Patent Procedure (e.g. see 961 OG 21, 1977) and that all restrictions on the availability to the public of the material so deposited will be irrevocably removed upon the granting of a patent.

Additionally, the deposit must be referred to in the body of the specification and be identified by deposit (accession) number, date of deposit, name and address of the depository and the complete taxonomic description.

The following is a quotation of the appropriate paragraphs of 35 U.S.C. 102 that form the basis for the rejections under this section made in this Office action:

A person shall be entitled to a patent unless —

(b) the invention was patented or described in a printed publication in this or a foreign country or in public use or on sale in this country, more than one year prior to the date of application for patent in the United States.

Claims 1-5 and 7-10 are rejected under 35 U.S.C. 102(b) as being anticipated by Mogna *et al.* (MI2001A002202).

The claims are directed to a method of eliminating or reducing the number of molds responsible for the production of mycotoxins in the feed by adding *L. plantarum* LMG P-21020, LMG P-21021, LMG P-21022 or LMG P-21023 or *L. pentosus* LMG P-21019.

Mogna *et al.* disclose the addition of *L. plantarum* LMG P-21020, LMG P-21021, LMG P-21022 or LMG P-21023 or *L. pentosus* LMG P-21019 to a vegetable mass intended for ensiling to inhibit the development of harmful microorganisms in the fodder. This method has the inherent effect of eliminating and/or reducing the number of molds responsible for the production of mycotoxins in the feed, including, of course, Aflatoxin B1. See, e.g., translation, page 16, paragraph 3, page 18, paragraph 3; page 19, lines 1-8 and claim 6 and 20. That mixtures of the strains are envisioned is evidenced by at least claim 20.

The size of inocula is disclosed at page 18, paragraph 3, for example. See also rejection under 35 U.S.C § 112, second paragraph regarding the lack of clarity for the size of "quintal" and whether dry or wet weight is intended.

Therefore, the invention is anticipated by the reference.

No claim is allowed.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Irene Marx whose telephone number is (571) 272-0919. The examiner can normally be reached on M-F (6:30-3:00).

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Michael G. Wityshyn can be reached on 571-272-0926. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300 .

Art Unit: 1651

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free).

/Irene Marx/  
Primary Examiner  
Art Unit 1651